



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO. E121 OF 2020

TETEZI HOUSE LIMITED.....PLAINTIFF

VERSUS

WYCLIFFE OKUNDA alias JERE.....1ST DEFENDANT

PHYLIS NYAWIRA.....2ND DEFENDANT

FLORENCE ATIENO OGOLA.....3RD DEFENDANT

JAMES ONYANGO.....4TH DEFENDANT

MAURICE OKOTH OGOLLA.....5TH DEFENDANT

ISAAC MACHARIA.....6TH DEFENDANT

MARTINE NGURE KINYANJUI.....7TH DEFENDANT

RULING

1. Coming up for determination are two applications. The notice of motion dated 9th September 2020 is brought under Article 40 of the Constitution of Kenya 2010, section 152A and 152E of the Land Act 2012, section 1A, 1B and 3A of the Civil Procedure Act, order 51 of the Civil Procedure Rule and all other enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. That this court grant a temporary injunction restraining the respondents by themselves, servants, workmen, agents and/or assigns from, renting or dealing in any manner of the illegal structures constructed on the Northern boundary of the parcel of land known as LR NO 209/5533/3 measuring 0.03 Ha situated in Shauri Moya Area, Nairobi until the substantive suit is heard and determined.

4. That this court grant a permanent injunction restraining the respondents by themselves, servants, workmen, agents and/or assigns from further construction of illegal structures on the Northern boundary of the parcel of land known as LR NO 209/5533/3 measuring 0.03 Ha situated in Shauri Moyo Area, Nairobi until the substantive suit is heard and determined.

5. Income currently drawn from the illegal structures situated on the Northern boundary of the parcel of land known as LR NO 209/5533/3 measuring 0.03Ha situated in Shauri Moyo Area, Nairobi be deposited with the court until the substantive suit is heard and determined.

6. That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (g).

4. The application is supported by the affidavit John Mburu, a director of the Plaintiff/Applicant, sworn on the 9th September 2020.

5. The notice of motion dated 5th May 2021 is brought under Article 40 and 159(2) of the Constitution of Kenya, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

6. It seeks orders:-

1. That the Respondents be and are hereby ordered to deposit the sum of Kshsh.10,000,000/- being the value of the portion of the suit property known as LR NO 209/5533/3 measuring 0.03 Ha that the Respondents have illegally encroached onto, into the custody of this honourable court pending the hearing and determination of this suit.

2. That in the alternative the respondents be and are hereby ordered to deposit on a monthly basis, rental income of Kshs.210,000/- currently being drawn from the illegal structures situated on the Northern boundary of the suit parcel of land an area approximately measuring 0.03 Ha, with this honorable court until the substantive suit is heard and determined.

3. That a reputable Estate Agent be appointed by this honourable court to collect, bank and account for the monthly rent currently being drawn from the illegal structures situated on the Northern boundary of the suit parcel of land measuring approximately 0.03 Ha situated in Shauri Moyo area, Nairobi until the substantive suit is heard and determined.

4. That in default of payments or deposits as ordered by this honourable court an eviction order do issue.

5. That the costs of this application be provided for.

7. The grounds are on the face of the application and are set out in paragraphs 1 to 8.

8. The application is supported by the affidavit of John Mburu, a director of the Plaintiff/Applicant sworn on the 5th May 2021.

9. The two applications are opposed. There is a replying affidavit sworn by Wycliffe Okunda also known as Jere, the 1st Defendant/Respondent, on the 8th September 2021. He told the court that he also had authority to swear the affidavit on behalf of the 2nd, 4th, 5th, 6th, and 7th Defendants/Respondents.

10. On the 16th June 2021, the court with the consent of the parties directed that the two applications be heard together. The court also directed that parties do file and exchange written submissions.

The Plaintiff's/Applicant's submissions

11. They are dated 24th September 2021. The Plaintiff/Applicant has moved to court seeking to have its rights to property guaranteed under Article 40 of the Constitution of Kenya, 2010 protected. It has put forward the cases of **Giella vs Cassman Brown [1973] EA; Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR; Mrao Limited vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

12. The Plaintiff/Applicant has a Certificate of Title issued to Kenya Planters Co-operative Union with a registered transfer to the Plaintiff. It has also exhibited a Certificate of Official Search indicating the transfer of the suit property to the Plaintiff/Applicant. There is also a Survey report prepared by Coge Cedar Geo Surveys indicating the area it claims to have been encroached by the Defendants/Respondents on the Northern boundary.

13. The Defendants/Respondents have not attached any proof showing that they complied with the conditions in the allotment letter. There is no letter from the defunct City Council that they were processing or would issue titles for the area they occupy. The Letter of Allotment is itself without proof of compliance with the terms and conditions. It cannot suffice as proof of ownership. It has put forward the cases of **John Mukora Wachichi & Others vs Minister of Lands and others HC Petition NO 82 of 2010; Joseph Arap Ng'ok vs Justice Moiwo Ole Keiwua Nai Civil App No 60 of 1997.**

14. The Plaintiff/Applicant is the registered owner of the suit property including the area occupied by the Defendants/Respondents. The same is being infringed by the Defendants/Respondents thus requires the intervention of the court.

15. The Plaintiff/Applicant will suffer irreparable harm as the Defendants/Respondents have occupied the Northern boundary of the suit property.

16. The balance of convenience is in favour of the Plaintiff/Applicant who is the registered owner of the suit property as the illegal structures on the 0.03 Ha of the Northern boundary have prevented it from fully utilizing its property thus occasioning loss to the Plaintiff/Applicant. It prays that the application be allowed.

The Defendants/Respondents Submissions

17. They are dated 12th November 2021. The Plaintiff/Applicant claims that the value of the suit property is Kshs.10,000,000/- but there is no report by a valuer to confirm this. They have put forward the cases of **Alice Wanjiru Ruhiu vs Messaic Assembly of Yahweh [2021] eKLR; Coast Legal Aid & Resource Foundation (CLARF) vs Coast Water Board Services & 2 Others [2012] eKLR; Clement Masanga Atonga vs Lewkadia Milungi [2021] eKLR.**

18. The Defendants/Respondents have been in occupation since 2006. This suit was filed in the year 2020, twelve (12) years after the Defendants'/Respondents' occupation of the land. They have put forward the case of **Sohanaldurgadass Rajput & Another vs Divisional Integrated Development Programmes Co. Ltd [2021] eKLR.**

19. The Plaintiff/Applicant acquired his property when the Defendants were in occupation, and the former registered owner knew the Defendants were in occupation.

20. The Defendants have acquired proprietary rights in the suit property by way of adverse possession despite the property being registered in the name of the Plaintiff. The Defendants have heavily invested in the suit property by putting up housing units. They have put forward the case of **Racheal Mukami Ngugi vs Mercy Wanjiru Thogo [2014] eKLR.**

21. The orders of eviction cannot be prayed for at this stage. The Plaintiff has failed to establish any inconvenience it stands to experience, but instead the Defendants stand to be inconvenienced if the orders sought are granted. They have put forward the case of **Peter Kihika Nganga vs Amos Kimeli Chamdala [2021] eKLR.**

22. The prayers sought by the Plaintiff/Applicant are final in nature and can only be granted upon hearing the case. They pray that the applications be dismissed with costs.

23. I have considered the pleadings, the notice of motions, affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions filed and the authorities cited. The issues for determination are:-

(i) Whether Plaintiff's/Applicant's applications meet the threshold for grant of temporary injunction.

(ii) Who should bear costs of the applications?

24. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the Applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

25. It is the Plaintiff's/Applicant's case that the Defendants/Respondents have encroached on the Northern boundary part of its suit property.

26. The Defendants/Respondents on the other hand state that they have been in occupation of the suit property long before the Plaintiff/Applicant bought the suit property.

27. The Plaintiff's/Applicant's director in his affidavit in support sworn on the 9th September 2020 states in paragraph 3:-

"That at the time of the purchase, the Respondents had constructed illegal structures consisting of housing units on the Northern boundary of the Applicant's parcel of land on a portion of the land measuring approximately 0.03 Ha (attached hereto and marked JM2 is a photograph showing the illegal structures).

In paragraph 9 he states:-

"That there have been numerous attempts to evict the Respondents through notices both by the previous owner and the Applicant herein including notices that date back to the year 2012 but the Respondents have not heeded the notices and continue to deprive the Applicant the enjoyment of the 0.03 Ha of the suit land they have encroached on (attached hereto and marked "JM4" is a copy of the notices issued to the Respondents)."

28. These averments confirm the Defendants'/Respondents' claim that they have been on the land way before the Plaintiff/Applicant bought the suit property.

29. I agree with the Defendants/Respondents submission that there is no valuation report to justify the amount of Kshs.10 million. Similarly, there is no evidence attached to show that the rent from the premises is Kshs.210,000/- per month.

30. I find that the orders sought by the Plaintiff/Applicant cannot be granted at an interlocutory stage. All parties would have to be heard before this court can determine the encroachment. In the case of **Peter Kihika Ng'ang'a vs Amos Kimeli Chamdala [2021] eKLR** the court held that:-

"This limb of the principle for grant of temporary injunction is actually a test of inconvenience caused to either party to the suit. Who will suffer the most if the orders are either granted or denied? Where the effect of denial of the injunction sought results in an inconvenience to a successful plaintiff/applicant, the court ought to issue the relief sought. Similarly, where the

resulting inconvenience is greater to the defendants than the applicant/plaintiff, then the court should not issue an injunctive relief.”

31. The upshot of the matter is that, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 10TH DAY OF MARCH 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Aradi for the Plaintiff

Mrs. Keah for 1st, 2nd, 5th and 7th Defendants

No appearance for 3rd and 4th Defendants

Steve - Court Assistant